

EXHIBIT A

In The Matter Of:

LAURA SIEGEL LARSON

v.

WARNER BROS. ENTERTAINMENT INC. AND DC COMICS

ORAL ARGUMENT

November 5, 2012

MERRILL CORPORATION

LegalLink, Inc.

20750 Ventura Boulevard
Suite 205
Woodland Hills, CA 91364
Phone: 818.593.2300
Fax: 818.593.2301

Appeal Nos. 11-56863, 11-56034
IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

LAURA SIEGEL LARSON,
Plaintiff, Counterclaim-Defendant, Appellant,
and Cross Appellee,

v.

WARNER BROS. ENTERTAINMENT INC. AND DC COMICS,
Defendants, Counterclaimants, Appellees,
and Cross-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA
THE HONORABLE OTIS D. WRIGHT II, JUDGE
CASE NO. CV-04-8400 ODW (RZx)

ORAL ARGUMENT
HEARD BEFORE NINTH CIRCUIT PANEL:
REINHARDT, THOMAS, SEDWICK
NOVEMBER 5, 2012

TRANSCRIBED BY: MELANIE M. FAULCONER
CSR NO. 6420

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<p>1 PASADENA, CALIFORNIA</p> <p>2 NOVEMBER 5, 2012</p> <p>3</p> <p>4 ---0---</p> <p>5</p> <p>6 MARC TOBEROFF, ESQ.: May it please the Court. Good</p> <p>7 morning, your Honors. My name is Marc Toberoff and I</p> <p>8 represent the Plaintiff, Laura Siegel Larson.</p> <p>9 I'd like to reserve 10 minutes of my 20 minutes</p> <p>10 for rebuttal, if I may.</p> <p>11 The Copyright Act's termination provisions were</p> <p>12 designed to remedy the tremendous imbalance of power</p> <p>13 between author/creators and media companies and to give</p> <p>14 an author and an author's family an opportunity after a</p> <p>15 very long waiting period to participate in the increased</p> <p>16 market value of their works by finally recovering their</p> <p>17 copyrights for the extended renewal term.</p> <p>18 This case has become emblematic of the kind of</p> <p>19 war of attrition an author's family must endure before</p> <p>20 vindicating those rights.</p> <p>21 I'm going to first turn to Warner Bros.'s</p> <p>22 alleged settlement agreement defense.</p> <p>23 Warner Bros.'s defense is based on a false</p> <p>24 contract -- construct that it can artificially limit the</p> <p>25 legal analysis to a single October 19th letter from the</p>	<p>1 Is it your second contention or is that the</p> <p>2 issue, whether there was a contract?</p> <p>3 MARC TOBEROFF, ESQ.: In this case --</p> <p>4 JUDGE REINHARDT: Yes.</p> <p>5 MARC TOBEROFF, ESQ.: -- the issue is whether</p> <p>6 there's a binding contract.</p> <p>7 JUDGE REINHARDT: Okay.</p> <p>8 MARC TOBEROFF, ESQ.: So here after the effective</p> <p>9 date of the settlement -- of the Siegels' termination in</p> <p>10 April of 1999, on again/off again settlement discussions</p> <p>11 ensued.</p> <p>12 And on October 9th, John Schulman on behalf of</p> <p>13 Warner Bros., their general counsel, and Kevin Marks on</p> <p>14 behalf of the Siegels held a telephone conference.</p> <p>15 On October 16th, Marks sends over a letter</p> <p>16 purporting to set forth the terms that were discussed on</p> <p>17 October 16th.</p> <p>18 On October 19th in his letter, he's -- he's</p> <p>19 going over the terms, but it's an equivocal letter</p> <p>20 because at the end he says, "John, if I got anything</p> <p>21 wrong, please let me know."</p> <p>22 JUDGE THOMAS: Why do you say that's equivocal?</p> <p>23 MARC TOBEROFF, ESQ.: Because it shows at the very</p> <p>24 beginning it's indefinite because he's unsure of --</p> <p>25 JUDGE THOMAS: No. That's using typical language.</p>
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<p>1 Siegels' attorney and call that a contract, regardless</p> <p>2 of the differing the terms in Warner Bros.'s October</p> <p>3 26th counteroffer and vastly different terms in Warner</p> <p>4 Bros.'s February 1st counteroffer, which were part and</p> <p>5 parcel of the exact same contract negotiation.</p> <p>6 The cases Warner Bros. relies on are in the</p> <p>7 opposite, particularly the Facebook case.</p> <p>8 In the Facebook case, unlike here, you had a</p> <p>9 binding contract signed by the parties. That contract</p> <p>10 also contained a stipulation saying that it would be</p> <p>11 binding and enforceable in a court of law. So the</p> <p>12 question before the Ninth Circuit was whether the terms</p> <p>13 of that contract were sufficiently definite to be</p> <p>14 enforceable. And of course this Court, since it</p> <p>15 basically called for the payment of fixed amounts of</p> <p>16 cash and stock, found that it was enforceable.</p> <p>17 None of that exists here. After the</p> <p>18 termination --</p> <p>19 JUDGE REINHARDT: Are you saying there was no</p> <p>20 contract or that the contract, if it existed, was not --</p> <p>21 not a contract that could be enforced?</p> <p>22 MARC TOBEROFF, ESQ.: There was no contract signed</p> <p>23 by the parties.</p> <p>24 JUDGE REINHARDT: No. I said -- that's your first</p> <p>25 contention, that there's no contract.</p>	<p>1 It makes -- "this is what I see."</p> <p>2 I mean, the response to it, if they -- if they</p> <p>3 had written back and said, "No. You're right," you'd</p> <p>4 have to agree that there's a contract; right?</p> <p>5 MARC TOBEROFF, ESQ.: That could be the case.</p> <p>6 JUDGE REINHARDT: What could be the case?</p> <p>7 MARC TOBEROFF, ESQ.: Well, you said --</p> <p>8 JUDGE REINHARDT: "This is absolutely right. This</p> <p>9 is the contract we agreed to," isn't -- wouldn't that be</p> <p>10 enough?</p> <p>11 MARC TOBEROFF, ESQ.: It's further along than the</p> <p>12 facts here, but what happened here isn't --</p> <p>13 JUDGE REINHARDT: That I know, but that wasn't the</p> <p>14 question.</p> <p>15 MARC TOBEROFF, ESQ.: Okay.</p> <p>16 JUDGE REINHARDT: All right. So this could be the</p> <p>17 contract if the parties agreed to it?</p> <p>18 MARC TOBEROFF, ESQ.: That's correct, if the party</p> <p>19 agreed to material terms, you could have a contract.</p> <p>20 JUDGE REINHARDT: Yeah.</p> <p>21 So you don't think that it's proper for a</p> <p>22 lawyer who says, "This is the contract we agreed to. If</p> <p>23 you have any question about it" --</p> <p>24 MARC TOBEROFF, ESQ.: I don't think it's --</p> <p>25 JUDGE REINHARDT: -- "tell me"?</p>

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<p>1 MARC TOBEROFF, ESQ.: -- improper at all, but I</p> <p>2 don't think that forms --</p> <p>3 JUDGE REINHARDT: But, I mean, that shows</p> <p>4 uncertainty?</p> <p>5 MARC TOBEROFF, ESQ.: It's not an unequivocal</p> <p>6 acceptance of terms, but -- but even that --</p> <p>7 JUDGE REINHARDT: No. It's a statement of the</p> <p>8 terms.</p> <p>9 MARC TOBEROFF, ESQ.: It's a statement of what he</p> <p>10 perceived the terms as discussed on October 16th.</p> <p>11 On October 26th, Schulman writes back while</p> <p>12 he -- Marks then goes off to China. On October 26th,</p> <p>13 Schulman writes back and in effect says, "You got it</p> <p>14 wrong. Enclosed is a more fulsome outline of what we</p> <p>15 believe the terms of the deal are."</p> <p>16 That constitutes a counteroffer because the</p> <p>17 terms outlined in the October 26th letter from Schulman</p> <p>18 materially differ from the terms in the October 19th</p> <p>19 letter from Marks.</p> <p>20 A counteroffer in the State of California</p> <p>21 extinguishes Marks' offer. Marks' offer itself is a</p> <p>22 counteroffer because he purports to accept an offer on</p> <p>23 October 16th that Schulman then tells him was never</p> <p>24 made. You could stop right there --</p> <p>25 JUDGE THOMAS: He didn't say that. He said that's</p>	<p>1 indemnify Warner Bros. We'll only warrant -- we haven't</p> <p>2 sold these rights to someone else," and Warner Bros.</p> <p>3 adding six or seven warranties with indemnifications</p> <p>4 attached.</p> <p>5 JUDGE REINHARDT: Well, both sides agreed that they</p> <p>6 had agreed to a contract.</p> <p>7 MARC TOBEROFF, ESQ.: No. Both sides perceived that</p> <p>8 they had a deal in principle. And the cases have said</p> <p>9 that a deal in principle does not make a binding</p> <p>10 contract.</p> <p>11 What happens is in his October 26th</p> <p>12 counteroffer Schulman doesn't stop there but he makes</p> <p>13 reference and incorporates by reference a February 1st</p> <p>14 draft that then comes in and widens the gap between the</p> <p>15 parties even further.</p> <p>16 On -- on May 9th, Joanne Siegel reacts to the</p> <p>17 new and different terms that are being added by Warner</p> <p>18 Bros. and -- and rejects those terms and says, "There</p> <p>19 will -- there is no agreement."</p> <p>20 And on May 26th -- she wrote a letter to the</p> <p>21 CEO of Time Warner, Dick Parsons. On May 26th, 2002</p> <p>22 Dick Parsons writes back and acknowledges that they had</p> <p>23 no agreement. He says, "We hope the parties can arrive</p> <p>24 at an agreement."</p> <p>25 From that point on, from October 19th of 2001</p>
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<p>1 "a more fulsome outline."</p> <p>2 I mean, we have a -- there are sort of two</p> <p>3 issues. One is, did the parties ever agree to the</p> <p>4 terms? And -- and, two, were the terms embodied in the</p> <p>5 first letter and-- and should a court enforce that?</p> <p>6 And we've had -- there are cases that go a</p> <p>7 little bit all over the map on that, but, I mean, there</p> <p>8 are a lot of cases in which you say, "All right. We</p> <p>9 know you added some terms, but this is the agreement the</p> <p>10 Court is going to enforce," and it's the simple</p> <p>11 agreement as to terms.</p> <p>12 So what -- what tells you that they're making a</p> <p>13 true counteroffer as opposed to adding a bunch of</p> <p>14 conditions that a court could later say, "Well, we're</p> <p>15 not going to put those in because obviously the parties</p> <p>16 didn't agree to them"?</p> <p>17 MARC TOBEROFF, ESQ.: Well, there's no agreement by</p> <p>18 Warner Bros. as to the terms set forth in his letter.</p> <p>19 In fact, there's disagreement. There's disagreement as</p> <p>20 to the properties that are being assigned. There's</p> <p>21 disagreement as to the essential term of compensation,</p> <p>22 which you're dealing with a -- you're not dealing here</p> <p>23 with a payment of cash and stock. You're dealing with a</p> <p>24 complex royalty system applicable to multiple media</p> <p>25 where you're dealing with Marks that says, "We will not</p>	<p>1 until we filed suit in -- in October of 2004, Warner</p> <p>2 Bros. not once said that, "We have an agreement and we</p> <p>3 accept the terms in the October 19th letter." They were</p> <p>4 totally silent for three years about that.</p> <p>5 They come up with this concocted defense when</p> <p>6 we filed suit to enforce the termination rights. Under</p> <p>7 cop- --</p> <p>8 JUDGE THOMAS: You've described a lot of factual</p> <p>9 considerations.</p> <p>10 Why -- why isn't this a matter for trial as</p> <p>11 opposed to summary judgment?</p> <p>12 MARC TOBEROFF, ESQ.: Because contract formation is</p> <p>13 based on the objective manifestations of the parties'</p> <p>14 intent. And here you have that objective manifestation</p> <p>15 in the form of three or four undisputed documents: the</p> <p>16 October 19th offer or counteroffer, the October 26th</p> <p>17 counteroffer, the February 26th counteroffer, the May</p> <p>18 9th rejection, and the May 26th letter in response</p> <p>19 acknowledging that there's no agreement.</p> <p>20 Warner has not come up with anything that</p> <p>21 creates a genuine issue of material fact.</p> <p>22 It -- the Court not only was allowed to rule on</p> <p>23 summary judgment, it was required to rule on summary</p> <p>24 judgment.</p> <p>25 JUDGE THOMAS: Why do you say that, "required"?</p>

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<p>1 MARC TOBEROFF, ESQ.: Because -- because based on --</p> <p>2 based on this undisputed objective manifestation of the</p> <p>3 parties' intent there, was no meeting of the minds on</p> <p>4 the material terms. The Court rightly said, "I can</p> <p>5 point to no document that contains the parties'</p> <p>6 agreement."</p> <p>7 Warner Bros. -- a negotiation is a give and</p> <p>8 take. You can't take an offer -- you can't go back</p> <p>9 freeze in time and take an offer that a party made, a</p> <p>10 proposal that you eviscerated by the counteroffer,</p> <p>11 continued to grind the other side in negotiations, and</p> <p>12 when that fails, reach back and try and resuscitate a</p> <p>13 offer that has been extinguished by a counteroffer.</p> <p>14 JUDGE REINHARDT: Well, an agreement was reached,</p> <p>15 according to your client's lawyer -- right? -- and he</p> <p>16 advised the other side on August 9th that, "I must</p> <p>17 caution. I believe an agreement was reached last</p> <p>18 October, albeit subject to documentation."</p> <p>19 So the issue was whether the documentation</p> <p>20 reflected the agreement.</p> <p>21 MARC TOBEROFF, ESQ.: The contract fell apart, as</p> <p>22 many contract negotiations, in the attempt to focus on</p> <p>23 the details of the agreement.</p> <p>24 JUDGE REINHARDT: There was an agreement and then</p> <p>25 there was a dispute over the details, the documentation</p>	<p>1 agreement? Yes, they did.</p> <p>2 And if-- and if these -- you know, people say</p> <p>3 "a deal is a deal" precisely when they don't have a</p> <p>4 binding contract.</p> <p>5 If these terms were not material to Warner</p> <p>6 Bros., then why did they insist upon them?</p> <p>7 If a deal is a deal, then why did they go --</p> <p>8 why didn't they just accept the October 19th recitation</p> <p>9 of the terms and why did they continue to grind the</p> <p>10 Siegels in the October 26th outline and in their</p> <p>11 horrendous contract?</p> <p>12 If you -- the same attorney, Marks, who sent</p> <p>13 that attorney-client communication, which ordinarily</p> <p>14 would have been privileged but for the fact it was</p> <p>15 stolen from my law offices, the same attorney that wrote</p> <p>16 that testified at length at deposition why, although he</p> <p>17 thought there was a deal, there was no binding contract,</p> <p>18 and he goes term by term by term in sworn testimony</p> <p>19 comparing the huge gaps between the parties that had</p> <p>20 developed.</p> <p>21 You can't form a contract for the parties. The</p> <p>22 contract -- the parties have to form a contract</p> <p>23 themselves. Nor can you go back and -- and arrest the</p> <p>24 legal analysis.</p> <p>25 JUDGE REINHARDT: I don't understand what that</p>
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<p>1 of it.</p> <p>2 MARC TOBEROFF, ESQ.: No. There was a deal in</p> <p>3 principle. But that deal in principle, for instance,</p> <p>4 involved a 6 percent royalty. That 6 percent royalty</p> <p>5 had all sorts of sliding scale reductions. There were</p> <p>6 exclusions as to revenues to -- to which that royalty</p> <p>7 would apply, would not apply. You had very important</p> <p>8 issues (unintelligible) studio agreements. You have a</p> <p>9 series of warranties that have indemnifications attached</p> <p>10 to them, and if someone is found that you've breached</p> <p>11 that warranty, they withhold the money on the royalty.</p> <p>12 JUDGE THOMAS: No. I understand that.</p> <p>13 MARC TOBEROFF, ESQ.: The question is not whether</p> <p>14 that's an unusual term. The question is whether it</p> <p>15 had -- it was contained in the October 19th letter. And</p> <p>16 here he's saying, "There will be no indemnification from</p> <p>17 the Siegels."</p> <p>18 So the question is, does that become a material</p> <p>19 term of the agreement?</p> <p>20 And it certainly is a material term. The fact</p> <p>21 you have such indemnities customarily in agreements I</p> <p>22 would submit is not the issue.</p> <p>23 The question is, did they agree to it on</p> <p>24 October 19th? And they didn't.</p> <p>25 Did Warner Bros. make that the condition of an</p>	<p>1 means.</p> <p>2 You can't form a contract between the parties</p> <p>3 if you're their representative?</p> <p>4 MARC TOBEROFF, ESQ.: No. A court cannot write a</p> <p>5 contract for the parties when the parties themselves</p> <p>6 cannot agree upon the terms.</p> <p>7 JUDGE THOMAS: No. The only question is whether</p> <p>8 they had an agreement in the earlier deal -- that's the</p> <p>9 question -- and whether then there was a counteroffer</p> <p>10 made later? I mean, those are -- those are the two</p> <p>11 questions.</p> <p>12 I mean, if they had -- we have all sorts of</p> <p>13 cases where you -- it happens all the time in</p> <p>14 mediation. Parties agree on principle. They draft up a</p> <p>15 set of principal points, and then they go draft</p> <p>16 documents, and then another fight erupts and they say,</p> <p>17 "Well, we can't agree on this." It might be</p> <p>18 indemnity. It might be something else. And then the</p> <p>19 Court says, "All right. I'm going to enforce the</p> <p>20 initial agreement that you made, period."</p> <p>21 Isn't that the question here?</p> <p>22 MARC TOBEROFF, ESQ.: No. Here you don't even have</p> <p>23 the first point.</p> <p>24 JUDGE REINHARDT: Well, that's --</p> <p>25 MARC TOBEROFF, ESQ.: Unlike --</p>

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<p>1 JUDGE THOMAS: That's why --</p> <p>2 MARC TOBEROFF, ESQ.: Unlike in the Facebook case</p> <p>3 where you have a signed document signed by the parties</p> <p>4 agreeing to certain terms that are definite and</p> <p>5 enforceable, you don't even have that here.</p> <p>6 And the reason we know you don't have that here</p> <p>7 is because rather than accept -- in your hypothetical</p> <p>8 you say they would accept the October 19th terms. They</p> <p>9 did the opposite. They didn't accept them.</p> <p>10 JUDGE THOMAS: Well, they purported to by saying,</p> <p>11 "Here's a more fulsome."</p> <p>12 Now, you -- you would say -- you say that's</p> <p>13 artifice and they were actually counter- --</p> <p>14 MARC TOBEROFF, ESQ.: Of course.</p> <p>15 JUDGE THOMAS: -- counterclaiming.</p> <p>16 MARC TOBEROFF, ESQ.: In the Valente -- in the</p> <p>17 Valente-Kritzer case this Court held that congratulatory</p> <p>18 words as to --</p> <p>19 JUDGE THOMAS: Yeah.</p> <p>20 MARC TOBEROFF, ESQ.: -- finally arriving at a deal</p> <p>21 or in our case a monumental accord are meaningless.</p> <p>22 What you look to is the objective manifestation</p> <p>23 and you don't have an agreement where you don't have a</p> <p>24 mutual meeting of the minds on the material terms of an</p> <p>25 agreement.</p>	<p>1 follows," and this was the culmination of two-and-a-half</p> <p>2 years of back and forth negotiations, and the record</p> <p>3 before the District Court was that this letter was</p> <p>4 written following a phone call between the two principal</p> <p>5 negotiators where they resolved the last deal point, and</p> <p>6 the testimony of Mr. Marks, the plaintiff's</p> <p>7 representative was, "We are closed. We will send you</p> <p>8 the document." Mr. Schulman responded, "Great. We'll</p> <p>9 start working on a long form."</p> <p>10 This document is then sent, and a week later</p> <p>11 Mr. Schulman responds, and, very importantly, this</p> <p>12 document is sent by one of the most experienced lawyers</p> <p>13 in one of the most experienced law firms in the country</p> <p>14 dealing with entertainment contracts. This lawyer who</p> <p>15 knows and probably has written thousands of times a</p> <p>16 reservation of rights that this document is not binding</p> <p>17 until and unless a long form or a more formal document</p> <p>18 is executed says no such thing in this letter.</p> <p>19 JUDGE REINHARDT: Now, are you talking about</p> <p>20 Mr. Schulman's letter?</p> <p>21 DANIEL M. PETROCELLI, ESQ.: No. I'm talking about</p> <p>22 the acceptance letter, the document that constitutes the</p> <p>23 contract. That's the letter of October 19, 2001.</p> <p>24 JUDGE REINHARDT: All right. And then you said -- I</p> <p>25 thought you said that the reply --</p>
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<p>1 And here the objective evidence proves that.</p> <p>2 And that's why in summary judgment the Court was</p> <p>3 required to find there was no agreement. And there is</p> <p>4 nothing that they put forward that raised a genuine</p> <p>5 issue of fact as to contract formation.</p> <p>6 I'd like to reserve the remainder for rebuttal.</p> <p>7 JUDGE REINHARDT: Thank you.</p> <p>8 MARC TOBEROFF, ESQ.: Thanks.</p> <p>9 DANIEL M. PETROCELLI, ESQ.: May it please the</p> <p>10 Court. Daniel Petrocelli with my colleagues Cassandra</p> <p>11 Seto and Matt Kline for the DC Comics parties.</p> <p>12 Turning initially to the issue of the</p> <p>13 settlement agreement, it's our fundamental position that</p> <p>14 this was not a matter appropriate for summary judgment</p> <p>15 and that the Court should have allowed this to go to</p> <p>16 trial on the lynchpin factual issues of whether or not</p> <p>17 the parties reached an agreement, and if so, to what?</p> <p>18 And our position in the Court below and in this</p> <p>19 appeal was that the parties did reach an agreement with</p> <p>20 the acceptance letter that the plaintiff's lawyer sent</p> <p>21 to DC Comics on October 19, 2001 at SER 456.</p> <p>22 This is a detailed recitation of terms written</p> <p>23 in powerful legal language of acceptance which says, "We</p> <p>24 hereby -- the Siegel family has accepted DC Comics'</p> <p>25 offer," and then it goes on to say, "The terms are as</p>	<p>1 DANIEL M. PETROCELLI, ESQ.: Okay.</p> <p>2 JUDGE REINHARDT: -- was written by Schulman.</p> <p>3 DANIEL M. PETROCELLI, ESQ.: I may have misspoken.</p> <p>4 But in this document following the conversation</p> <p>5 with the DC representative, there's no indication in</p> <p>6 here that the parties do not intend to be bound until</p> <p>7 some future event. There's no reservation, and the</p> <p>8 testimony in the record is, "We are closed."</p> <p>9 Then a week later, Mr. Schulman, the recipient</p> <p>10 of Mr. Marks' letter and the other negotiator, responds</p> <p>11 to it, and he states -- and I won't characterize it as a</p> <p>12 counteroffer because I think that's begging the issue.</p> <p>13 He states, "I've received it. I've reviewed it. I</p> <p>14 enclose herewith for you and Bruce a more fulsome</p> <p>15 outline of what we believe the deal we've agreed to is.</p> <p>16 We're working on the draft agreement so that by the time</p> <p>17 you have accomplished something of truly momentous</p> <p>18 import, we will have this super matter transaction in</p> <p>19 document form." And then he goes on and flushes out in</p> <p>20 more detail the same terms that appear in the October 19</p> <p>21 letter and adds some things here and there to be sure,</p> <p>22 like an indemnity or he flushes out a detail on some of</p> <p>23 these royalty provisions. These are essentially</p> <p>24 immaterial variations and differences that are the</p> <p>25 normal part of a process of commencing a long -- a long</p>

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<p>1 form document.</p> <p>2 Now, the error, the fundamental error of</p> <p>3 analysis here both by the District Court and by</p> <p>4 Mr. Toberoff is -- is the fact that this process is</p> <p>5 going on, that there's now an effort to create a long</p> <p>6 form is dispositive of the -- of the conclusion that</p> <p>7 there is no contract.</p> <p>8 And that's what the District Court ruled.</p> <p>9 Simply because the parties after the contract was formed</p> <p>10 in the -- in the unambiguous acceptance letter, just</p> <p>11 because of that, the fact that they now endeavor to do a</p> <p>12 long form, the judge concluded as a matter of law there</p> <p>13 can be no agreement.</p> <p>14 And that's just wrong.</p> <p>15 There are scores of cases. This is an</p> <p>16 extremely familiar situation where parties believe</p> <p>17 they've reached a deal. They have a confirmatory letter</p> <p>18 or document. They go off to prepare the long document.</p> <p>19 Something happens, things breakdown, and one side then</p> <p>20 says, "We don't have a deal."</p> <p>21 JUDGE REINHARDT: Was there any affidavit or</p> <p>22 information introduced in the District Court as to the</p> <p>23 custom and practice in the industry of reaching an</p> <p>24 agreement, proceeding with it and then having the</p> <p>25 documents prepared?</p>	<p>1 but we -- at the very minimum we believe that we're</p> <p>2 entitled to a trial.</p> <p>3 The judge just departed wildly from the summary</p> <p>4 judgment standard. He drew all that adverse inference</p> <p>5 against us. He -- he did not understand that the</p> <p>6 question of whether or not the long form process does or</p> <p>7 does not negate a prior agreement is a factual</p> <p>8 question.</p> <p>9 Your Honor dealt with that issue, if I may, in</p> <p>10 the -- you had a case with Judge Pregerson on -- it was</p> <p>11 the Best Interior -- the Best Interiors case, the same</p> <p>12 situation. The plaintiff was a labor union and they --</p> <p>13 and they sued this company, and they had an agreement,</p> <p>14 they had a handshake agreement, and then they went on to</p> <p>15 do a long form, and things broke down, and the judge</p> <p>16 concluded there was no deal as a matter of law, and this</p> <p>17 Court reversed that and this Court said that the</p> <p>18 question of the intent to contract is a fact issue. The</p> <p>19 question of whether the subsequent events undid the</p> <p>20 prior agreement or didn't undo the prior agreement,</p> <p>21 that's a fact question.</p> <p>22 JUDGE THOMAS: So are there undisputed facts or</p> <p>23 not?</p> <p>24 I mean, I -- I'm not sure I -- I understand</p> <p>25 your answer because Judge Reinhardt was asking you, "Is</p>
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<p>1 DANIEL M. PETROCELLI, ESQ.: There was no custom and</p> <p>2 practice evidence in the record, but to be sure, that</p> <p>3 would be highly relevant on the issue.</p> <p>4 Mr. Schulman had a direct declaration in the</p> <p>5 record saying that Mr. Larson's (sic) letter accurately</p> <p>6 reflected all the terms of the deal and that he wasn't</p> <p>7 intending to change anything and he was just flushing</p> <p>8 out the detail.</p> <p>9 Now the proof is in the pudding.</p> <p>10 In response to this letter of October 26, which</p> <p>11 the plaintiffs want to suggest is some material</p> <p>12 departure, they even go so far as to say this is a</p> <p>13 counteroffer. In response to Mr. Schulman's letter,</p> <p>14 Mr. Marks never objects. He never reaches out and says,</p> <p>15 "Wait a second. You got a problem. That's not what</p> <p>16 we've agreed to."</p> <p>17 JUDGE REINHARDT: Tell me why, if that's correct, is</p> <p>18 this matter for trial rather than summary judgment for</p> <p>19 you?</p> <p>20 DANIEL M. PETROCELLI, ESQ.: Well, we did not move</p> <p>21 for summary judgment in the Court below.</p> <p>22 JUDGE REINHARDT: You're not asking for that here?</p> <p>23 DANIEL M. PETROCELLI, ESQ.: Well, we think the</p> <p>24 record evidence that there is an agreement is so strong</p> <p>25 that we do think it can support a judgment in our favor,</p>	<p>1 there sufficient evidence to -- for summary judgment in</p> <p>2 your favor?" And -- and you said, "Well, yes, there are</p> <p>3 fact issues," so I'm --</p> <p>4 DANIEL M. PETROCELLI, ESQ.: There are -- there</p> <p>5 are --</p> <p>6 JUDGE THOMAS: Tell me aside from the documents</p> <p>7 themselves what genuine issues of material fact you</p> <p>8 would raise.</p> <p>9 DANIEL M. PETROCELLI, ESQ.: The ques- -- the</p> <p>10 threshold question of whether the parties intended to be</p> <p>11 bound and by this letter, by this -- by this acceptance</p> <p>12 letter or whether they intended not to be bound at that</p> <p>13 time but only upon such time as they agreed to a long</p> <p>14 form. We say that they intended to be bound at this</p> <p>15 time.</p> <p>16 But that question and all the events that</p> <p>17 happened, that's evidence that's relevant to the</p> <p>18 threshold issue of whether or not there was a deal in</p> <p>19 the first place. It is not dispositive that there was</p> <p>20 no deal.</p> <p>21 And so that's the -- that's the fundamental</p> <p>22 factual issue.</p> <p>23 There's a second factual issue, I suppose, and</p> <p>24 that's what -- what terms the parties agreed to.</p> <p>25 Well, we -- our position is it's everything in</p>

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<p>1 this letter, nothing more. To the extent that</p> <p>2 Mr. Schulman's letter is perceived to have added terms</p> <p>3 or suggested new terms, they're not part of the deal.</p> <p>4 It's that simple.</p> <p>5 JUDGE THOMAS: Why isn't that a matter of law that</p> <p>6 you can decide on the basis of the documents</p> <p>7 themselves?</p> <p>8 DANIEL M. PETROCELLI, ESQ.: You can decide as a</p> <p>9 matter of law that if the parties reached the contract</p> <p>10 as of October 19, everything thereafter doesn't matter.</p> <p>11 What can't be decided as a matter of law is</p> <p>12 that the parties did not reach an agreement. That</p> <p>13 cannot possibly be resolved against us with this record</p> <p>14 of direct admissions by the plaintiffs that there was an</p> <p>15 agreement, not only in the acceptance letter, not only</p> <p>16 in the no response to Mr. Schulman's letter, thereby</p> <p>17 indicating there was nothing significant or new or</p> <p>18 different about it, but --</p> <p>19 JUDGE REINHARDT: Well, the second one was even more</p> <p>20 fulsome than the first, I guess.</p> <p>21 DANIEL M. PETROCELLI, ESQ.: Excuse me?</p> <p>22 JUDGE REINHARDT: The second one was more fulsome</p> <p>23 than the first.</p> <p>24 DANIEL M. PETROCELLI, ESQ.: The second one to be</p> <p>25 sure was 50 pages of boilerplate, yes, but --</p>	<p>1 never look at this document and conclude as a matter of</p> <p>2 law that it's not sufficient to be a contract.</p> <p>3 Whether there are new and additional terms that</p> <p>4 the parties wanted and whether that somehow gets added</p> <p>5 on here or doesn't get on, that's a fact question that</p> <p>6 takes testimony about the significance to which parties</p> <p>7 attach to -- to the point, did they discuss it in their</p> <p>8 negotiations, did they not discuss it, did they forget</p> <p>9 to put in something, did they not forget, and that's the</p> <p>10 subject of testimony.</p> <p>11 Counsel has conflated this idea of the</p> <p>12 objective hearing of contracts, which to be sure is how</p> <p>13 the issue is decided, with the rules of evidence about</p> <p>14 what kind of testimony is admitted in order to prove up</p> <p>15 intent.</p> <p>16 All kinds of testimony is admitted, including</p> <p>17 custom and practice, including parties' state of mind as</p> <p>18 to why they did certain things, why they said certain</p> <p>19 things.</p> <p>20 So at bottom we think that this case never</p> <p>21 should have been thrown out, and importantly this has</p> <p>22 the potential to dispose of this entire dispute.</p> <p>23 Under this agreement, which took three years to</p> <p>24 negotiate, the plaintiffs would receive an immediate</p> <p>25 payment of \$20 million, plus substantial future</p>
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<p>1 JUDGE THOMAS: Well, except -- except perhaps as to</p> <p>2 royalty rate.</p> <p>3 DANIEL M. PETROCELLI, ESQ.: Excuse me?</p> <p>4 JUDGE THOMAS: Except perhaps as to royalty rate.</p> <p>5 DANIEL M. PETROCELLI, ESQ.: Well, under royalty</p> <p>6 rate, if you really read the letter between Mr. Schulman</p> <p>7 and Mr. Marks, they're -- they're flushing out very</p> <p>8 precise little details about when the royalty rate gets</p> <p>9 reduced, if multiple characterizes are involved, if it's</p> <p>10 a cameo appearance, if it's a special project. I mean,</p> <p>11 this is why sometimes documents take 50 pages or more.</p> <p>12 But that's not a material term, the absence of</p> <p>13 which would negate a contract, and if it were, that</p> <p>14 itself is a question of fact. And case after case say</p> <p>15 the -- the importance to which the parties attach to</p> <p>16 particular terms is a fact question.</p> <p>17 There was a question to Mr. Toberoff earlier I</p> <p>18 think by Judge Reinhardt about whether this document,</p> <p>19 this -- this contract, this acceptance letter of October</p> <p>20 19 has sufficient material terms to constitute a</p> <p>21 contract.</p> <p>22 It does. It easily passes the test. I mean,</p> <p>23 the threshold, as the Facebook case illustrates, is very</p> <p>24 low: price, term. So there's no question that this</p> <p>25 document contains sufficient terms that a court could</p>	<p>1 consideration for the duration of the copyright term,</p> <p>2 which is 2033, plus medical benefits for their family</p> <p>3 and all kinds of other benefits.</p> <p>4 On the other hand, DC gets the transfer of the</p> <p>5 copyright interests that were recaptured by the Siegel</p> <p>6 family. So they -- they transfer the copyright</p> <p>7 interests, and they get a lot of money.</p> <p>8 JUDGE REINHARDT: Well, that's not -- that's</p> <p>9 not -- no need to try to persuade us it's a good deal</p> <p>10 for them. If they think it's a good deal --</p> <p>11 DANIEL M. PETROCELLI, ESQ.: Well --</p> <p>12 JUDGE REINHARDT: -- for them, they wouldn't be</p> <p>13 here.</p> <p>14 DANIEL M. PETROCELLI, ESQ.: Well, that's correct,</p> <p>15 your Honor, because they believed they had a better deal</p> <p>16 when someone came along and offered them more, and --</p> <p>17 and they then repudiated this agreement.</p> <p>18 And one final comment.</p> <p>19 This question about what we did and did not do</p> <p>20 afterwards, that's a very incomplete recitation that was</p> <p>21 received, but all of that is simply more relevant</p> <p>22 evidence on the question of whether the parties at the</p> <p>23 inception when they made their deal intended to be bound</p> <p>24 or not. That's just evidence of subsequent conduct of</p> <p>25 the parties. Whether it bears on the contract formation</p>

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<p>1 or not is a relevance issue that's up to the trial judge 2 here.</p> <p>3 JUDGE SEDWICK: Let me ask you this question. 4 We had read your papers to suggest you were 5 seeking summary judgment, but assuming that you're 6 either now only seeking a remand for trial or that we 7 should independently decide that that's the most you 8 could get, do you think that this Court needs to decide 9 any of the other issues if we remand this case for trial 10 and whether there was an agreement?</p> <p>11 DANIEL M. PETROCELLI, ESQ.: I believe that since 12 this is potentially dispositive, it does not have to 13 because if this contract is proven and this contract is 14 enforced, that ends once and for all this dispute. 15 Every issue that is before your Honors and these very 16 large amount of briefs would all -- would all resolve. 17 That's why it took three years to do. This wasn't some 18 initial offer.</p> <p>19 JUDGE REINHARDT: You may not be the one to answer 20 this question, but just out of curiosity, would it 21 resolve the prior case also?</p> <p>22 DANIEL M. PETROCELLI, ESQ.: Well, it would have a 23 significant impact at least on the damages in the prior 24 case and my view is it would go a long way to resolving 25 that one as well, at least insofar as the Siegel side is</p>	<p>1 It is undisputed that certain elements of this 2 were done by DC in concert with Shuster and Siegel but 3 with other employees and artists. So we asked the Court 4 to declare certain parts of this -- certain parts of 5 this owned by DC, either as a work for hire or as a 6 joint work or other theories of ownership.</p> <p>7 The Court said he was -- the Court concluded it 8 was precluded from doing so because of a decision back 9 in the seventies in the Second Circuit by DC's 10 predecessor and Siegel and Shuster called the National 11 case, and the Court believed that the National case was 12 res judicata and/or collateral estoppel and prevented DC 13 from litigating the issue of whether it had ownership 14 interest and admittedly part of the contributions that 15 it made to Action Comics 1.</p> <p>16 And I only wanted to address the Court's ruling 17 on collateral estoppel. But it was clearly wrong for 18 the following reason, and this is a purely legal issue.</p> <p>19 The National case back in the seventies was a 20 lawsuit about who owned the renewal copyright in Action 21 Comics 1, and this was before the new termination 22 legislation came about, the second 28-year renewal 23 term.</p> <p>24 DC contended that it owned the renewal term for 25 two separate and independent reasons.</p>
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<p>1 concerned.</p> <p>2 I don't know if I have any time left.</p> <p>3 JUDGE REINHARDT: You have five minutes.</p> <p>4 DANIEL M. PETROCELLI, ESQ.: I would like to turn to 5 one other legal issue that's on a totally separate 6 subject, if your Honors don't have any additional 7 questions on this topic, and that has to do with a 8 decision, purely legal decision that the District Court 9 below made.</p> <p>10 And what the Court decided was that this very 11 first Superman comic book, which is called "Action 12 Comics Number 1," SER 714, the District Court decided 13 that since this was largely created by Mr. Siegel and 14 Mr. Shuster long before DC came into the picture, "this" 15 being the character Superman in black and white 16 sketches, that he awarded the copyrights in the various 17 elements in this action comics book entirely to the 18 Siegels and the Shusters.</p> <p>19 The error -- we -- we said to the judge, "We 20 don't challenge that in the main, except for this. We," 21 DC, "back in 1938 came up with the idea of making a 22 comic book. Siegel and Shuster had drawn sketches of 23 Superman for newspaper strips in black and white. We 24 want to create a comic book. We want to put it in 25 color. And we then retained them to do so."</p>	<p>1 One, the Siegel and Shuster parties transferred 2 full ownership of their Superman elements way back when 3 when they first met with DC and documented March 1. So 4 they said, "We own it by contract."</p> <p>5 Second, secondly DC said -- actually it was 6 National, its predecessor, but I'll just call it "DC." 7 DC said, "We own it because it was work for hire and we 8 were the author of it, and so we own the renewal 9 rights." So they said, "We own the renewal right for 10 those reasons."</p> <p>11 The District Court agreed on both counts, and 12 it went up to the Second Circuit.</p> <p>13 The Second Circuit affirmed on the ground that 14 the conveyance of rights back in 1938 from Siegel and 15 Shuster to Na- -- to DC included the conveyance of the 16 rights to the renewal term, and so the decision below 17 was correct and it was affirmed.</p> <p>18 The Second Circuit then went on to say, 19 however, that the ruling about work for hire was 20 incorrect, and it made some references to the fact that 21 Superman had been developed before DC came along, so how 22 could the entirety of Action Comics 1 be a work for 23 hire?</p> <p>24 It's that language that the judge in this case, 25 the District Court, felt was binding on him.</p>

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<p>1 We pointed out below and pointed out in our 2 papers, as a matter of law that cannot be res judicata 3 or collateral estoppel because that was an adverse 4 determination made in favor of a prevailing party and it 5 was not necessary to the decision and it was dictum. 6 We, for example, never could have appealed that 7 decision. We won, National did. It never could have 8 appealed solely for the purpose of addressing the 9 alternative statement by the Court of Appeal that was 10 adverse to -- to National. 11 And case after case make this clear, including 12 the Fireman's Fund case in the Ninth Circuit, the -- 13 JUDGE REINHARDT: All right. We're running out of 14 time. Let me just ask you. 15 Is this -- is this issue resolved if you win on 16 the summary judgment question? 17 DANIEL M. PETROCELLI, ESQ.: Yes. Everything goes 18 away on the summary judgment, everything, your Honor. 19 It's -- it's the end of this case once and for all. 20 JUDGE REINHARDT: All right. Thank you very much. 21 DANIEL M. PETROCELLI, ESQ.: Thank you very much 22 your Honors. 23 MARC TOBEROFF, ESQ.: Your Honors, Warner Bros. 24 cannot point to any place in 2001 where they accepted 25 the terms set forth in the October 19th, 2001 letter</p>	<p>1 California and it's still that way in California. So 2 regardless of how you -- 3 JUDGE REINHARDT: Well, take -- take the example of 4 a movie distribution deal or a movie production deal 5 where the parties make -- they agree to the deal. They 6 then start with the movie. Finally in the middle of the 7 movie they get down to reducing everything to writing 8 and there's a disagreement but both parties agree that 9 "we have a deal." 10 Now, is that not an agreement without the 11 written exposition of it? 12 MARC TOBEROFF, ESQ.: It depends on the terms of the 13 agreement. Here -- here -- and there have been cases 14 about that where one side has argued, "In California and 15 Hollywood we do lunch. We don't do contracts," and 16 they've rejected those arguments when it came down to 17 specific contract formation issues like this. 18 They cannot point to an acceptance of the terms 19 of the October 19th letter. And instead we have -- 20 JUDGE THOMAS: Well, it depends on who is the 21 offerer and who is the -- who is the accepting party. 22 What -- what the October 19th letter says, "This 23 is to confirm our telephone conversation," it goes on to 24 say, "which we accept the DC Comics' offer of October 25 16th."</p>
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<p>1 from Marks. 2 I don't know how one can find that a contract 3 exists without mutual agreement of both sides. 4 Instead of agreement from Warner Bros. we have 5 disagreement as reflected in the October 26th letter and 6 as reflected in Warner Bros.'s agreements. 7 It's -- it's insane to say this is purely a 8 question of formal documentation of an agreement of the 9 parties when there is -- 10 JUDGE REINHARDT: The problem -- and maybe you can 11 comment on this, Mr. Toberoff. The problem is that the 12 October 26th letter doesn't reject the October 19th 13 letter. It says, "a more ful- -- I'm enclosing a 14 fulsome outline of what we believe the deal we've agreed 15 to is." 16 Now, the argument on the other side is that 17 that says, "We've agreed to a deal but we're giving you 18 a more expansive outline of what that deal is." 19 Now, what's the answer to that? 20 MARC TOBEROFF, ESQ.: The answer to that is whether 21 or not there's a contract is not based on verbiage such 22 as "a more fulsome outline." It's based on the 23 comparison of the terms. And anything less than an 24 unequivocal acceptance of an offer is a counteroffer 25 extinguishing that offer. It's been that way forever in</p>	<p>1 So if there's a legitimate offer on the 16th 2 and accepted on the 19th, does it really matter what 3 happened after that? 4 MARC TOBEROFF, ESQ.: Yes, it does because on -- 5 JUDGE THOMAS: I mean, if there's a contract 6 formation as of this and it's reflected in the letter of 7 the 19th, then -- then there's a deal. 8 MARC TOBEROFF, ESQ.: But this is an ongoing 9 negotiation that continues into 2002. 10 JUDGE THOMAS: No. I understand that. 11 MARC TOBEROFF, ESQ.: And that's acknowledged by all 12 the parties. So you can't artificially limit the 13 analysis to an oral communication on October 16th and a 14 written communication on October 19th. 15 JUDGE THOMAS: I'm just saying, to my mind at least, 16 I haven't come to rest on it, but it certainly suggests 17 that it's a more complicated situation, and therefore 18 there's a -- probably a genuine issue of material fact. 19 MARC TOBEROFF, ESQ.: I -- I can see none. And I 20 can tell you why. Because when he refers to the October 21 16th conferen- -- teleconference and -- and asks, "Do 22 you agree that these are the terms?" because that's what 23 he says, he says, "If I got anything wrong, let me 24 know," he's essentially asking, "Do you agree, Warner 25 Bros., that these are the terms?" and all they would</p>

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<p>1 have to have done is said, "Yes," then you would have a 2 different situation.</p> <p>3 And that's not the situation that exists here, 4 and the objective evidence shows that -- the undisputed 5 evidence shows that it's not the situation that exists 6 here.</p> <p>7 What it shows is that Warner Bros. said, 8 "That's not what I believe" --</p> <p>9 JUDGE THOMAS: They didn't say that.</p> <p>10 MARC TOBEROFF, ESQ.: Yes, they did.</p> <p>11 JUDGE THOMAS: They said, "Here's -- here's a -- 12 here's a larger outline."</p> <p>13 Now today they say, "Well, that's essentially 14 the same terms." And you can say, "Well, it's not the 15 same terms."</p> <p>16 And, you know, obviously they didn't agree -- 17 the parties did not agree on indemnity, period. There's 18 no agreement on indemnity.</p> <p>19 But the question for the Court is not 20 necessarily whether there was -- whether -- the question 21 is whether there was a contract formed before that.</p> <p>22 MARC TOBEROFF, ESQ.: Exactly. This isn't -- well, 23 there's not a contract formed before that if when he 24 says, "This is the terms that we believe were 25 discussed," he doesn't just say, "more fulsome outline,"</p>	<p>1 District Court who dealt with this in tremendous 2 detail. It's in our reply excerpts at Pages 140 to 149 3 where we outline the material differences.</p> <p>4 Warner acknowledges that the properties being 5 assigned is an essential term using -- using words from 6 the -- from the Facebook case.</p> <p>7 Well, the properties in the Marks' memo are 8 limited to three properties: Superman, Superboy and 9 Spectre.</p> <p>10 The properties in Schulman's memo and then in 11 the February 1st agreement concern Superman, Superboy, 12 related properties and anything created for DC, whether 13 published or unpublished, by Siegel. So there's an 14 expansion of what is even being assigned.</p> <p>15 Secondly, the royalties. You have a very 16 complex royalty situation here. It's not like in 17 Facebook with a fixed amount of money and a fixed amount 18 of stock. You have a 6 percent royalty which was 19 reducible to 3 percent, which is then reducible to 1 1/2 20 percent to 1 percent as an absolute floor.</p> <p>21 Warner Bros. drills all sorts of holes in that 22 floor rendering them illusory and -- and having 23 situations where they would receive no money whatsoever 24 for the exploitation of Superman.</p> <p>25 These are material contract terms. You can't</p>
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<p>1 he says, "a more fulsome outline of what we believe the 2 terms are." They then send over a contract and reserve 3 the right of Warner Bros. to -- to -- to revise the 4 terms, and they acknowledge that the Siegels can also 5 revise the terms. It's not just a matter of these 6 indemnity provisions.</p> <p>7 I would refer the Court --</p> <p>8 JUDGE THOMAS: No. I understand that. I just used 9 that as an example.</p> <p>10 I mean, it often happens where you have a deal 11 reached, a deal letter like this, and then the parties 12 add terms, and they say, "Well, that's not part of our 13 deal," and then they may agree or disagree on subsequent 14 terms, but that doesn't alter the original agreement or 15 the fact that it's been made.</p> <p>16 MARC TOBEROFF, ESQ.: The problem is you have no 17 acceptance to those original terms. The hypothetical 18 doesn't apply here.</p> <p>19 JUDGE THOMAS: Unless you say that this -- the -- 20 the letter of the 19th accepts an offer of the 16th.</p> <p>21 MARC TOBEROFF, ESQ.: And -- and we have a letter 22 from October 26th saying that wasn't the offer, "This is 23 what we believe the deals are."</p> <p>24 Now, I want to draw the Court's attention to a 25 chart in our reply brief below which impressed the</p>	<p>1 ignore them. They change the -- the -- the dance 2 between offer and counteroffer. And that's the way 3 contract formation is analyzed in the State of 4 California.</p> <p>5 Warner Bros. has a situation where if Superman 6 appears in a -- in another character's contract 7 published by DC, like Green Arrow, for weeks Superman is 8 appearing but the name is not in the title of the comic 9 book, under -- under Schulman's scenario, you would 10 receive a -- excuse me -- under Marks' scenario, you 11 would receive a royalty. Under Warner Bros.'s scenario, 12 you receive no royalty.</p> <p>13 It comes as no surprise that all of the changes 14 made by Warner Bros., which they now say are boilerplate 15 and not material, were all decidedly in Warner Bros.'s 16 favor and affect the key terms of the agreement: the 17 scope of the properties, the royalties and 18 compensation.</p> <p>19 The -- the warranties and indemnifications is 20 not a small matter because what happens with the studios 21 when you enter in a contract and you have substantial 22 contingent compensation and there's any claim by a third 23 party or anything happens which they can claim triggers 24 a warranty, they will withhold your -- they will 25 withhold your royalty payments.</p>

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<p>1 There are credit provisions where Marks says, 2 "We want credit in paid ads," because that's very 3 important to his clients and he testifies that to 4 effect. 5 Warner Bros.'s October 26th outline and their 6 long form says, "No credit in paid ads." Warner Bros. 7 requires an elderly Joanne Siegel who is in her late 8 eighties to go on publicity tours promoting Superman. 9 None of this exists. There's -- 10 JUDGE REINHARDT: Well, that doesn't sound like 11 (unintelligible) form. As David's (sic) saying, "These 12 are the sort of -- the kind of things we put in our 13 contracts." 14 And, you know, that clause isn't drawn for her 15 individual -- you know, because they're concerned about 16 her. That's a boilerplate provision. 17 MARC TOBEROFF, ESQ.: Well, it's not boilerplate to 18 say that the Siegels have to indemnify Warner Bros. for 19 a claim for her ex-husband. 20 JUDGE REINHARDT: No, no. I'm talking about that 21 Joanne -- that Joanne Siegel has to go on a tour. You 22 know, those are the kinds of things that have to be 23 worked out after there's a contract. 24 MARC TOBEROFF, ESQ.: Well, but the royalty 25 provisions and the scope of the properties assigned go</p>	<p>1 that requires a resolution by a fact-finder. 2 MARC TOBEROFF, ESQ.: I respectfully disagree, your 3 Honor. If you look at the October 26th Warner Bros. 4 communication, it specifically refers, "We will have 5 this matter drafted in contract form and we will send it 6 to you." So right there you know -- 7 JUDGE THOMAS: Well, that's what happens in all 8 cases. You don't have a -- you always have -- 9 MARC TOBEROFF, ESQ.: But that's not extrinsic 10 evidence. That's objective evidence saying that -- 11 showing that the parties anticipated that the form of 12 agreement would be a written agreement signed by both 13 parties. And that's what's required by the Copyright 14 Act. That never happened. And then they send it over 15 and they reserve the right to -- 16 JUDGE THOMAS: I don't mean to quarrel with you. 17 I'm just -- you know, we're working through these -- 18 these cases. 19 But what often happens when you have a 20 situation like this is the Court will say, "If you have 21 enough for specific enforcement of the terms to which 22 you agreed," and therefore you execute the unnecessary 23 assignments and so forth. 24 The fact that they weren't all executed I don't 25 think is dispositive.</p>
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<p>1 to the heart of this. And under Section 204(a) of the 2 Copyright Act when you have an assignment of a 3 copyright, it has to be in writing signed by the 4 assignee. 5 Marks' letter does not assign any trans- -- any 6 copyrights. It says, "We will. We anticipate signing 7 those contracts." 8 Nobody in this exchange viewed the October 19th 9 letter outlining deal terms or the October 26th letter 10 outlining different deal terms as a binding, enforceable 11 contract. Everybody understood that considering the 12 magnitude of these rights and the complexity of the 13 agreement that was being discussed that you would have a 14 final written agreement signed by both parties. 15 JUDGE THOMAS: So how do we -- how do we determine 16 that as a matter of summary judgment, that everybody 17 understood? 18 MARC TOBEROFF, ESQ.: Because -- because -- 19 JUDGE THOMAS: No. I mean, you can't -- you can't 20 do that without -- without extrinsic evidence of the 21 parties. 22 And you well may be right. I'm just saying. 23 But if you can't do it on the basis of the documents 24 alone. If you have to rely on what you say is that 25 everybody understood, then that's extrinsic evidence</p>	<p>1 Now, you may well be right on it. I'm just 2 saying that it's a more complicated issue than -- 3 MARC TOBEROFF, ESQ.: Your Honor, I believe if you 4 peel back the veneer of comments like "a deal is a deal" 5 and look at the actual facts of this case carefully, you 6 will see that under every single principle in California 7 law about contract formation this fails as a matter of 8 law and you can make that determination on this 9 objective exchange of undisputed documents. The parties 10 absolute -- in the State of Calif- -- 11 JUDGE REINHARDT: I think we've explored this 12 fully. And you're seven minutes are over, so -- 13 I mean, you know, these are not simple issues, 14 and I don't mean that the answer may not be simple, but 15 the case, as you say, you know, we're going to -- to the 16 extent that we haven't sufficiently read them, we'll 17 certainly explore them all, and, you know, we understand 18 the arguments of both side, and they're legitimate 19 arguments, so -- 20 MARC TOBEROFF, ESQ.: I'd just like to read to you 21 from a memo that you pointed out, Marks' memo, which by 22 the way is an extra-record document that should be made 23 part of this record, but I'd like to read to you what 24 Marks actually says in that memo. 25 He says, "I believe a deal will be finalized</p>

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1 with DC Comics, even if this process is not entirely
2 smooth -- smooth. If the parties cannot reach final
3 agreement, then the negotiations would be terminated."
4 That's what he says in an attorney-client communication
5 that they're saying proves there was a binding
6 contract.

7 JUDGE REINHARDT: Okay. Thank you.

8 MARC TOBEROFF, ESQ.: Thank you, your Honor.

9 JUDGE REINHARDT: The case just argued will be
10 submitted.

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1 C E R T I F I C A T E

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3 I, Melanie M. Faulconer, certify
4 that the foregoing transcript is a true
5 record of said proceedings, that I am not
6 connected by blood or marriage with any of
7 the parties herein, nor interested directly
8 or indirectly in the matter in controversy,
9 nor am I in the employ of counsel.

10 I have hereunto subscribed my name
11 this 6th day of November, 2012.

12
13

14 _____
15 MELANIE M. FAULCONER

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12 (Pages 42 to 43)

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